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719453—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 528

THE LOGIN CORPORATION, A CORPORATION,
PETITIONER

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. Its findings of fact and conclusions of law appear at pages 24–26 of the record. The opinion of the circuit court of appeals (R. 38–42) is reported at 155 F. (2d) 623.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 22, 1946 (R. 43). The petition for rehearing was denied on June 24, 1946 (R. 44). The petition for a writ of certiorari

was filed on September 23, 1946. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347 (a)).

QUESTION PRESENTED

Whether the parties to an action, by agreeing to a statement of a case under Rule 76 of the Federal Rules of Civil Procedure, may specify the legal issues involved in the case and deprive the circuit court of appeals of jurisdiction to decide the case on another ground.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the Appendix, *infra,* pp. 8–11.

STATEMENT

The petitioner is a corporation organized under the laws of California, and having its principal place of business at 300 Montgomery Street, San Francisco, California. This action for treble damages, instituted against the petitioner by the Price Administrator under Section 205 (e) of the Emergency Price Control Act, as amended, *infra,* pp. 8–9, was based upon sales by the petitioner of Cuban rock lobster at prices alleged to be in excess of those permitted by the General Maximum Price Regulation. A stipulation of facts was entered into, reciting the details of the transaction in question (R. 3–13). Section 1499.2 of

the General Maximum Price Regulation, *infra*, p. 10, provided that the ceiling price on these sales should be the highest price charged by the seller in March 1942. Section 2 of the Maximum Import Price Regulation, *infra*, pp. 10–11, however, provided that the maximum price regulations did not apply to "the purchase of any commodity to be imported into the continental United States by any person who deals [1] directly with a foreign seller whose place of business is located outside the continental United States or [2] with his selling agent wherever located." The lobster involved was shipped to the United States from Cuba by the Compania Commercial Gainsborough, a Cuban corporation, and disposed of in San Francisco by the petitioner (R. 8). The price charged was in excess of the petitioner's ceiling price, as established by the General Maximum Price Regulation (R. 4). At a pre-trial conference, the trial judge ruled, as a matter of law, that on the basis of the stipulation of facts, the petitioner was not the "selling agent" of the Compania Commercial Gainsborough, and that it was, therefore, subject to the ceilings contained in the General Maximum Price Regulation; that the only issues left to be tried by the jury, which the petitioner had demanded, were those involving the quantities of lobster involved in the sales and whether the action of the petitioner was willful or the result of failure to take practical pre-

cautions to avoid the occurrence of the violations[1] (R. 15–17). The parties then stipulated the quantity of lobster involved in the sales, and that if there had been any violation of the price regulation in connection with the said sales, it was neither willful nor the result of failure to take practical precautions to avoid such violation (R. 17–18). The trial judge then ruled that no question of fact remained for determination by the jury, and entered judgment against the petitioner for the amount of the overcharges. (R. 18–19, 24–26).

Notice of appeal to the Circuit Court of Appeals for the Ninth Circuit was filed (R. 26), and an agreed statement of the case under Rule 76 of the Federal Rules of Civil Procedure, *infra,* pp. 9–10, was entered into (R. 2–26). This statement contained the following declaration: "* * * the principal question was whether or not these were purchases by persons dealing 'directly with a foreign seller whose place of business is located outside of the continental United States, or with his selling agent wherever located' within the meaning of the O. P. A.'s Maximum Import Price Regulation * * *" (R. 14–15). In their briefs in the circuit court of appeals, both parties addressed their arguments to the question of

[1] If the overcharges were not the result of willfulness or failure to take practical precautions, damages are limited to the amount of the overcharges. Emergency Price Control Act of 1942, as amended, Section 205 (e), *infra*, p. 8.

whether, on the basis of the stipulated facts, the petitioner was a "selling agent" of Gainsborough and therefore exempt from ceiling prices, or a seller in its own behalf, and thus subject to the General Maximum Price Regulation.

The circuit court of appeals, however, affirmed the judgment of the trial court on the grounds that the Maximum Import Price Regulation applied only to sales of commodities *to be* imported into the continental United States; that the record showed that the lobster was in the United States at the time of the sales;[2] and that the exemption contained in the Maximum Import Price Regulation was, therefore, inapplicable, regardless of whether the petitioner was or was not the selling agent of a foreign seller (R. 41–42).

ARGUMENT

Petitioner contends that the parties to this action, by entering into stipulations of the facts and by drawing up the agreed statement of the case

[2] The petition for certiorari attacks the correctness of the procedure of the court below in deciding the case upon a ground allegedly excluded therefrom by the agreed statement, and does not question directly the accuracy of the court's statement that the lobster involved had already been imported when it was sold and was therefore not exempt from price control. Nevertheless, it may be pointed out that the court was correct in reaching this result. Since the individual cases of lobster were not segregated from the carload or earmarked for particular sellers until after the arrival of the freight car in San Francisco (R. 8), the sale of the lobster did not occur when it was still in Cuba, but presumably took place only after its arrival in San Francisco.

pursuant to Rule 76 of the Federal Rules of Civil Procedure, selected the issues upon which the circuit court of appeals might pass, and precluded it from deciding the case upon any ground other than those which the counsel had urged. It has long been established, however, that the parties to an action may not, by stipulation, select the ground upon which a court must decide a case, or eliminate a possible ground of decision. As this Court stated in the case of *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 289, "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law." See also, *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 113–114; *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 51; *California* v. *San Pablo and T. R. Co.*, 149 U. S. 308, 314; *Pettibone* v. *Cook County*, 120 F. (2d) 850, 856 (C. C. A. 8); *London-Butte Gold Mines Co.* v. *Commissioner*, 116 F. 2d 478, 480 (C. C. A. 10); *Andrews* v. *St. Louis Joint Stock Land Bank*, 107 F. (2d) 462, 470 (C. C. A. 8), certiorari denied, 309 U. S. 667. Nor is there any reason why a different conclusion should be reached where the stipulation forms part of an agreed statement of the case, drawn up pursuant to Rule 76 of the Federal Rules of Civil Procedure. We have found no cases under this Rule, in which the point was raised, but under

its precursor, Equity Rule 77,[a] the same doctrine has been applied. See *Barnett* v. *United States*, 82 F. (2d) 765 (C. C. A. 9), certiorari denied, 299 U. S. 546, wherein the court at page 767 said:

> In so far as the stipulation purported to state certain propositions of law to be decided by this court upon appeal, it departs from [Equity] rule 77 and must be disregarded. The parties have no right to determine by stipulation the questions to be decided on appeal.

CONCLUSION

The decision of the court below is clearly correct. There are no conflicts of decision and the case does not call for review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1946.

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[a] See note of the Advisory Committee on Rule 76, Federal Rules of Civil Procedure, p. 293.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 632; 50 U. S. C. App., Supp. V, 901 et seq.). Section 205 (e):

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or re-

ceipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

Federal Rules of Civil Procedure (28 U. S. C. following section 723 (c)):

Rule 76. Record on Appeal to a Circuit Court of Appeals; Agreed Statement. When the questions presented by an appeal to a circuit court of appeals can be determined without an examination of all the

pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the appellate court as the record on appeal.

General Maximum Price Regulation (7 F. R. 3153):

§ 1499.2 *Maximum prices for commodities and services: General provisions.*—Except as otherwise provided in this General Maximum Price Regulation, the *seller's* maximum price for any commodity or service shall be:

(a) *In those cases in which the seller dealt in the same or similar commodities or services during March 1942:*

The highest price charged by the seller during such month—

(1) For the same commodity or service;

Maximum Import Price Regulation (8 F. R. 11681):

§ 2 *Purchases From Foreign Sellers Excepted From This And Other Price Regu-*

lations. Neither this regulation nor any other price regulation (unless it contains express provision governing such purchases) shall apply to the purchase of any commodity to be imported into the continental United States by any person who deals directly with a foreign seller whose place of business is located outside the continental United States or with his selling agent wherever located.

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